TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 481

BENNY LURK, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 21, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

Supreme Court of the United States

OCTOBER TERM, 1961

No. 481

BENNY LURK, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

[fol. A]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 180-60

UNITED STATES OF AMERICA

v.

BENNY LURK, DEFENDANT

Washington, D. C.
Tuesday, March 22, 1960.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial at 11:15 a. m. before the HONORABLE JOSEPH R. JACKSON, Judge, and a jury.

APPEARANCES:

On behalf of the Government:

JOHN W. WARNER, JR.
Ass't United States Attorney.

On behalf of the defendant:

RALPH C. COLE, ESQ.
1735 - 14th St. N.W.
Wash. 9, D. C.

* * * *

[fols. 3-8] * * * *

* * * *

[fol. 9] CHARLES C. EDGEWORTH

was called as a witness by and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[fol. 10] BY MR. WARNER:

* * * *

[fol. 11] A. I paid the girl for my 2 meals and bottle of beer and the other girl was getting them ready and I was sitting there drinking the beer and a boy walked in with him.

Q. When you say him, who do you mean?

A. With Benny. The other fellow was in front of Benny.

Q. When you say Benny, do you mean one Benny Lurk?

A. That is right.

Q. The defendant in this case?

A. That is right.

Q. Where is he in the courtroom today?

A. Sitting right here.

Q. How is he dressed?

A. He was dressed—

Q. How is he dressed today?

THE COURT: How is he dressed now?

THE WITNESS: He has got on a brown jacket.

BY MR. WARNER:

Q. With or without necktie?

A. No necktie.

MR. WARNER: May the record show this witness has identified the defendant, Your Honor?

THE COURT: The record may so show.

BY MR. WARNER:

[fol. 12] Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.

MR. WARNER: I think we should strike that answer, Your Honor, I didn't realize that was the case.

THE COURT: It may be stricken.

BY MR. WARNER:

Q. So you had seen him before this date, is that correct?
A. That is right.

* * * *

[fols. 13-14] * * * *

* * * *

[fol. 15] CROSS EXAMINATION

BY MR. COLE:

* * * *

[fols. 16-26] * * * *

[fol. 27] Q. And what did you do at headquarters?
A. I described the men to them and told them what happened.
Q. And you told them that you knew this man; is that correct?
A. I told them I knew his face but didn't know his name.
Q. I believe you mentioned that you knew this man at Occoquon; is that right?
MR. WARNER: I think that answer has been stricken from the record, Your Honor.
THE COURT: The question may be stricken.
MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.
THE COURT: If this man has a record all right. Why do you mention Occoquon?
MR. COLE: Of course, we are not introducing his record at this time, but I think—
THE COURT: Why don't you ask him where he saw him first?

BY MR. COLE:

Q. Where did you first see this man, Mr. Lurk?
A. 7th and T.
Q. When was this?
[fol. 28] A. Over 4 or 5 years ago, maybe longer.
Q. Did you know him at that time?
A. No, I never knew him. I just knew his face when I would see him.

Q. You saw this man for the first time in your life at 7th and T Streets, Northwest; is that correct?

A. That is right.

Q. What happened that impressed his identity upon you?

A. The man was sitting in the next booth to me drinking beer.

Q. 7th and T about 4 or 5 years ago?

A. Yes, it may be longer than that.

Q. Did you have any conversation with him at that time?

A. No.

Q. Well, what happened that his identification was impressed upon you at that particular time?

A. His identification wasn't impressed upon me.

Q. How can you so clearly remember that you saw Benny Lurk 5 years ago at 7th and T Streets, Northwest?

A. Any time I see a person's face one time I never forget it.

Q. I see. Now, where was the next time you saw Benny Lurk?

A. 7th and T.

[fol. 29] Q. 7th and P, as in Paul?

A. 7th and P Streets, Northwest.

Q. Is that P as in Paul?

A. Yes, P as in Paul.

Q. When was that occasion?

A. Oh, that wasn't very long after I seen him at 7th and T.

Q. At the same bar room?

A. No, it wasn't.

Q. Standing on the street?

A. Standing outside on the sidewalk. He was with some more people talking.

Q. And you talked with him?

A. No, I didn't talk with him. I was talking to another fellow named March.

Q. When was the next time that you saw him after that particular instance?

A. From time to time I have seen Benny for the last 5 or 6 years, from time to time, but not knowing his name.

Q. Would you call him a friend of yours?

A. I don't.

Q. An acquaintance?

A. No.

Q. Did you ever talk to Benny?

[fol. 30] A. Once.

Q. Where was that?

A. 7th and P.

Q. Do you recall what the conversation was?

A. He wanted to get a drink, me and him and March.

Q. Did you want a drink too?

A. No.

Q. How long ago was that?

A. That was long in April or May.

Q. Now, you described each and every time that you have ever seen Benny Lurk?

A. Yes.

Q. Other than these times at 7th and P Streets, you have never seen Benny Lurk, is that right?

A. Yes.

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. Now pursue your question.

THE WITNESS: Me and Benny done a year in Occoquon, that is why I knew him.

Q. What were you charged with?

A. Assault.

[fol. 31] Q. You did a year in Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

* * * *

[fols. 32-52] * * * *

* * * *

[fol. 53] THE COURT: Closing argument for the defendant.

MR. COLE: May it please the Court, may it please you ladies and gentlemen of the jury:

• • • •

[fol. 54] • • • •

• • • •

[fol. 55] These are things that you have to decide. These [fol. 56] are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years. And then we have this situation, over 6 weeks passes by and then suddenly one day Mr. Edgeworth, the complaining witness, sees Benny Lurk, the face that he never forgets, and he calls the police and they come. And they take Benny Lurk to headquarters.

• • • •

[fol. 57-59] • • • •

• • • •

[fol. 60] JUDGE'S CHARGE

• • • •

[fols. 62-65] • • • •

• • • •

[fol. 66] The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

The law does not compel any defendant to take the [fol. 67] witness stand and testify, therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. The defendant is under no obligation to testify when he is being tried.

• • • •

[fols. 68-70] • • • •

• • • •

[fol. 71] AT THE BENCH

THE COURT: Are you satisfied with the instructions?
MR. WARNER: The Government is satisfied.
MR. COLE: Satisfied, Your Honor.

• • • •

[fols. 72-74] • • • •

• • • •

[fol. 75] Reporter's Certificate to foregoing transcript omitted in printing

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1481

BENNY LURK, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE APPEAL WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF—Filed May 16, 1960

The petitioner, Benny Lurk being first duly sworn, on oath deposes and says that he desires to appeal from the order (or judgment) entered in the District Court on April 29, 1960 in Crim. No. 180-60, Benny Lurk v. United States of America, and is unable to pay the costs of the appeal, or to give security therefor; and that he believes that he is entitled to redress.

Your petitioner further states that subsequent to the entry of the order (or judgment) an application to prosecute an appeal from the order (or judgment) without prepayment of costs, accompanied by an affidavit in conformity with Section 1915 of Title 28, U. S. Code, was on April 28, 1960, made to the trial court, thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on May 4, 1960, denied petitioner's application.

The nature of the appeal is as follows:

To appeal from the conviction and judgment rendered by United States District Court for the District of Columbia on the 29th day of April 1960, Honorable Judge Jackson presiding, and list as the reasons for his appeal the following:

1.—Denied due process of law by having incompetent counsel appointed by the court who failed to summons witnesses who were vital to petitioner's defense.

2.—No probable cause for arrest.
3.—No positive identification made at any time.
4.—Denied a fair and impartial trial.
5.—Arrest was made on mere suspicion. (See Poldo v. United States, 55 F 2d 866, 869.) As follows: "Mere suspicion is not enough, there must be circumstances represented to the arresting officers through testimony of their senses sufficient to justify them in a good faith belief that the defendant had violated the law . . ."

[fol. 77] WHEREFORE, petitioner requests that he be allowed to appeal from the order (or judgment) without being required to prepay fees or costs, or to give security therefor.

/s/ Benny Lurk
Petitioner.

Duly sworn to by Benny Lurk. Jurat omitted in printing

[fol. 78] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Prettyman, Chief Judge, in Chambers.

ORDER APPOINTING COUNSEL—May 18, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, it is

ORDERED that Eugene Gressman, Esquire, a member of the bar of this court, is appointed to represent petitioner and allowed until June 18, 1960, to file a memorandum in support of the petition.

[fol. 79] IN THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MOTION FOR PRODUCTION OF TRANSCRIPT—
Filed June 15, 1960

Petitioner, through his Court-appointed counsel, hereby moves the Court for an order directing that a transcript of the trial proceedings in the District Court, held on March 22, 1960, be prepared at the expense of the United States and that petitioner's counsel be given at least 30 days following the receipt of such transcript to prepare and file a memorandum in support of the petition for leave to prosecute an appeal *in forma pauperis.* As grounds for this motion, petitioner's counsel states:

1. Following his appointment by this Court as counsel for petitioner, counsel examined the available court files, interviewed the petitioner and conferred with Mr. Ralph C. Cole, the attorney appointed to represent petitioner at the trial in the District Court. These measures were taken in order to determine as accurately as possible whether there exists any non-frivolous grounds of appeal, and, more particularly, whether there is any basis for asserting, as petitioner has done *pro se,* that (1) he was represented at the trial by incompetent court-appointed counsel who failed to summon vital witnesses, (2) that there was no probable cause for arrest, (3) there was [fol. 80] a denial of a fair and impartial trial and (4) there was no positive identification made of the petitioner at any time.

2. The absence of a transcript, however, has made it impossible for counsel to evaluate and present the merits of this appeal in such a manner as to do full justice to petitioner and to fulfill his duties to this Court. Particularly after conferring with court-appointed trial counsel, this counsel is not convinced that the trial was conducted

free of all reversible errors or that there was a complete absence of plain errors going to the justness and fairness of the proceeding.

3. Thus in a case of this nature, the merits or frivolousness of the appeal cannot be tested or determined by any means other than an examination of the trial record. The available sources of information outside the record—the formal files and the memory of certain individuals—are too incomplete and uncertain to consitute a substitute for the transcript. And if counsel is to be enabled to give full effect to the direction of the Supreme Court in *Ellis* v. *United States,* 356 U.S. 674, that "representation in the role of an advocate is required," the transcript must be made available. See *Griffin* v. *Illinois,* 351 U.S. 12.

Wherefore, it is submitted that the transcript should be prepared at the expense of the United States.

Respectfully submitted,

/s/ Eugene Gressman
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court

[fol. 81] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 82] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Edgerton and Bazelon, Circuit Judges, in Chambers.

ORDER DIRECTING THAT STENOGRAPHIC TRANSCRIPT BE FURNISHED—July 8, 1960

On consideration of petitioner's motion to have stenographic transcript prepared at the expense of the United States, respondent's opposition, and petitioner's reply, it is

ORDERED by the court that petitioner be allowed to prosecute an appeal without prepayment of costs to the extent of having the transcript of the proceedings in the District Court prepared without costs, and it is

FURTHER ORDERED by the court that the stenographic transcript of proceedings in this case in the District Court be furnished to petitioner at the expense of the United States.

Per Curiam.

Dated: July 8, 1960

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—
Filed August 31, 1960

This memorandum is filed pursuant to this Court's order dated May 18, 1960, appointing the undersigned counsel to represent the petitioner. On July 8, 1960, in response to a motion made on behalf of the petitioner, the Court ordered that petitioner be allowed to prosecute the appeal without prepayment of costs to the extent of having the transcript of the trial proceedings in the District Court prepared without costs and furnished to petitioner at the expense of the United States. Counsel has accordingly had the benefit of such transcript in the preparation of this memorandum.

STATEMENT OF THE CASE

On January 27, 1960, a report was filed in the District Court concerning a proceeding had the previous day before United States Commissioner James F. Splain. That report recited that the petitioner had been arrested for an alleged violation of the robbery statute, 22 D.C. Code 2901, that he had been brought before the Commissioner and informed of his right to retain counsel, and that petitioner had requested an immediate hearing. The report then summarized the testimony of the witness for the United States, Charles C. Edgeworth, as follows:

[fol. 84] ". . . on Dec. 14, 1959 while in Miss Jones' restaurant between 10 and 10:30 P.M., waiting for a carry out food order, the def. and another man came into the place; *that he knows the Def. because he*

served a year in Jail with the Def.; that the other man stuck a knife into him and said don't move; that while he was being held at knife point, the Def. went into his pockets and removed his money and also took his eyeglasses; that he was cut in the hand by the knife and the Def. and the other man ran out; that he went home and called the police." (Emphasis added).

The report concluded by stating that probable cause had been shown. Bail was fixed at $5000 and petitioner, who had not testified, was committed to jail.

On February 23, 1960, a one-count indictment was filed in the District Court charging that petitioner "stole and took from the person and from the immediate actual possession of Charles C. Edgeworth property of Charles C. Edgeworth of the value of about $58.31 consisting of the following: one billfold of the value of $2.00, $46.31 in money and one pair of eyeglasses of the value of $10,00."

The following day, February 24, Ralph E. Becker was appointed to represent the petitioner, but on February 26, Ralph C. Cole was appointed in his stead. Petitioner was arraigned on February 26 without counsel present; he entered a plea of not guilty and was remanded to the District jail. On March 4, with counsel Cole present, petitioner was arraigned again and again pleaded not guilty.

Trial was had before the jury on March 22, 1960, Judge Joseph R. Jackson presiding. At the trial, four witnesses testified for the United States and none for the defense. The testimony of the prosecution witnesses may be summarized as follows:

Charles C. Edgeworth, the complaining witness, testified that on the evening of December 14, 1959, he had gone to Miss Jones' Restaurant at 9th and O Streets, N. W., in [fol. 85] Washington, D. C., to order some food to take out. While waiting for the food to be prepared he ordered and drank a bottle of beer. Tr. 11. The petitioner and a companion walked into the restaurant at that point. The companion put a knife to Edgeworth's stomach while petitioner rifled his pockets and snatched money from his hands. Tr. 13. Edgeworth was cut on the hand by the

knife. Tr. 13. Petitioner and his companion (who was never identified) then ran out of the restaurant. Tr. 13. Edgeworth told a waitress that he had been robbed of his money. Tr. 14. He then got a cab, went home and called the police. Tr. 14. Some time later he observed petitioner near a street corner, called the robbery squad, and pointed petitioner out to the policemen who arrived in answer to the call. Tr. 14. Petitioner was thereupon arrested. Edgeworth also testified as to the amount of money and the value of the other items taken from him. Tr. 15.

Edgeworth was cross-examined thoroughly by petitioner's appointed counsel. Tr. 15-35. On cross-examination, Edgeworth recounted more details as to the incidents in the restaurant, including certain remarks made by petitioner and his companion in the course of the robbery. Tr. 18-19. He stated that there were about 15 to 20 people in the restaurant at the time. Tr. 23. He further stated that about 10 minutes elapsed between the robbery and the moment when the food he had ordered was ready. Tr. 25. He told one of the waitresses that he had been robbed, and she told him not to follow the men. Tr. 21. Finally, when his food was ready, Edgeworth departed in a cab, went home and called the police. Tr. 24. There was a phone booth in the restaurant but he did not use it. Tr. 25. The police, in response to his call from home, told Edgeworth to come to headquarters the following [fol. 86] morning, Tr. 26, at which time he told what happened and described the men, Tr. 27. He stated to the police that he knew petitioner's face but not his name. Tr. 27. Edgeworth recounted that he had seen petitioner on various occasions in the past. Tr. 27-30.

Edgeworth was also cross-examined as to the events on January 26, 1960, when petitioner was arrested. Tr. 32-35. He happened to see petitioner in front of a beer garden at the corner of 7th and P Streets, N.W. Tr. 33. Edgeworth immediately went inside a drug store and called the police, who sent a squad car. Tr. 33. Edgeworth got into the squad car and pointed out petitioner to the officers, petitioner having moved in the meantime to a parking lot on 8th Street. Tr. 34.

Annie Alston, the second prosecution witness, was a waitress at the restaurant. She recalled that Edgeworth had been in the restaurant on the night in question and that she had observed money being snatched from Edgeworth's hands. Tr. 37. She also had seen the cut on Edgeworth's hand but did not see the men who took the money. Tr. 37. On cross-examination, she testified that four men had come into the restaurant and had sat down at a table. Tr. 41. They left right after the robbery but she did not know who they were. Tr. 42. She did not see any of them rifle Edgeworth's pockets but did see one of them snatch money from Edgeworth's hand. Tr. 42. Edgeworth started to follow them out but then returned. Tr. 43. She heard him tell another waitress that he had been robbed. Tr. 43.

The other waitress referred to by Annie Alston was not produced as a witness, the Assistant United States Attorney stating that efforts to locate her had proved futile. Tr. 45.

The other two witnesses for the prosecution were *Detective George R. Wilson* and *Private David B. McQueen.* The first officer testified that Edgeworth had told him of the robbery on the morning of December 15 and had de-[fol. 87] scribed petitioner to him, though not by name. Tr. 46-47. Private McQueen testified that he had placed petitioner under arrest on January 25, after being called by Edgeworth to the vicinity of 7th and P Streets, N. W. Tr. 49-50.

Following the presentation of this testimony the United States rested its case and the defense waived "its right to place the defendant on the stand." Tr. 48. In addition to the foregoing summary of testimony, the following colloquies are to be noted:

(Direct examination of Edgeworth by Assistant United States Attorney, Tr. 12.)

Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.

MR. WARNER: I think we should strike that answer, Your Honor, I didn't realize that was the case.

THE COURT: It may be stricken.

• • • •

(Cross-examination of Edgeworth by petitioner's appointed counsel, Tr. 27.)

Q. And what did you do at headquarters?

A. I described the men to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquon; is that right?

MR. WARNER: I think that answer has been stricken from the record, Your Honor.

[fol. 88] THE COURT: The question may be stricken.

MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.

THE COURT: If this man has a record all right. Why do you mention Occoquon?

MR. COLE: Of course, we are not introducing his record at this time, but I think—

THE COURT: Why don't you ask him where he saw him first?

• • • •

(Cross-examination of Edgeworth by petitioner's appointed counsel. Tr. 30-31)

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. Now pursue your question.

THE WITNESS: Me and Benny done a year in Occoquon, that is why I knew him.

Q. What were you charged with?
A. Assault.
Q. You did a year at Occoquon?
A. That is right.
Q. You saw Benny there, you say?
A. Yes, I used to be the food adviser.

• • • •

(Closing argument by petitioner's appointed counsel. Tr. 56.)

These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years.

• • • •

[fol. 89] *(Judge's charge to jury, Tr. 66.)*

The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

• • • •

At the conclusion of the trial, the jury found petitioner guilty as charged. A motion for a new trial was denied on March 29, 1960. Petitioner was then duly sentenced to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months.

On April 29, 1960, the District Court granted the petition of Ralph C. Cole to be relieved of his assignment to defend petitioner. Petitioner then filed *pro se* a motion for leave to appeal *in forma pauperis*, which motion the District Court denied on May 4, 1960, "as plainly frivolous and not made in good faith."

Petitioner's *pro se* petition for leave to appeal *in forma pauperis* was filed in this Court on May 16, 1960.

Substantial Questions Presented By the Record

On behalf of the petitioner, it is submitted that there are at least two questions posed by the record that are non-frivolous and, indeed, substantial in nature so as to warrant the grant of permission to proceed *in forma pauperis*. Certain other questions raised by the petitioner *pro se* are, in the opinion of undersigned counsel, either [fol. 90] without merit or are subsumed under the first question presented herewith.[1]

---

[1] Petitioner *pro se* has made the following points:

1. He was denied due process by having incompetent counsel appointed by the District Court who failed to summon witnesses vital to the defense of petitioner. But the undersigned counsel suggests that the said appointed counsel, insofar as the formal record is concerned, conducted a vigorous defense on behalf of petitioner. Inquiry of said appointed counsel has revealed that he did not call other witnesses since he did not feel that they could contribute any testimony helpful to the defense. If there is to be any criticism of that counsel, it is in terms of his failure to raise specific objections to the questions, answers and jury charge in connection with the first substantial question presented in this memorandum.

2. There was no probable cause for arrest. But the complaint of the complaining witness and his description and pointing out of the petitioner would seem to provide sufficient cause.

3. No positive identification at any time. But the complaining witness did identify petitioner at the time of his arrest. The complete reliance on the complaining witness for identification purposes, however, is implicitly involved and is of some importance in the first substantial question discussed in this memorandum.

4. Petitioner was denied a fair and impartial trial. It is not clear to what this allegation refers. But see the first point discussed in this memorandum.

5. Petitioner's arrest was made on mere suspicion. But see point 2 above.

I. *Do the references at the trial to petitioner's past criminal record constitute plain reversible error?*

Axiomatic, of course, is the proposition that where a criminal defendant does not take the stand evidence as to his unsavory character or past criminal record is inadmissible. This is so, not because of its irrelevance, but because of a dominant policy which recognizes that what tends to show a likelihood that the accused has flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge. *Michelson* v. *United States,* 335 U.S. 469, 475; *Boyd* v. *United States,* 142 U.S. 450.

In this case, the record contains repeated references to the fact that petitioner had previously been in prison [fol. 91] at Occoquon Workhouse, a well-known jail for District of Columbia prisoners. Since petitioner did not take the stand in self-defense, a serious and substantial question is thereby raised in terms of the above-stated policy. Full review and consideration of this case is necessary in order to determine if petitioner has been accorded a full measure of his constitutional right to a fair trial. Several facets to this problem are presented by the record:

A. *The prosecution was responsible for the first reference to petitioner's past criminal record.* As previously indicated herein (pp. 1-2, *supra*), about two months before the trial, the U. S. Commissioner filed a report which summarized the evidence of the complaining witness. That report indicated that the witness testified that he had identified the petitioner "because he served a year in Jail with the Def". And that report was presumably in the hands of the Assistant United States Attorney, *or at least available to him,* when he examined the complaining witness on the stand at the trial.

Thus when the Assistant United States Attorney asked the complaining witness where he had seen the petitioner before, he must have known or *should have known* that the witness would answer to the effect that he had seen petitioner in jail. Tr. 12. The prosecutor cannot be heard to say, as he did, that "I didn't realize that was the case." Tr. 12.

But even if it be considered that the answer was unexpected, and inadvertent from the Government's point of view, the fact remains that the answer was elicited by Government counsel and not by the defense. Cf. *United States* v. *Tramaglino,* 197 F. 2d 928, 932 (C.A. 2). Error was committed by the reference to petitioner's prior presence at Occoquon, a reference made in the presence of the jury.

[fol. 92] The availability of the earlier report of the U. S. Commissioner, however, makes pertinent the language and holding of the court in *United States* v. *Tomaiolo,* 249 F. 2d 683, 695-696 (C.A. 2):

> "And it is fairly apparent that the prosecutor knew that the answers to his questions would reveal Soviero's criminal past. Certainly the special agents of the FBI had already advised him, out of court, of the reason why Soviero refused to sign the statement.
>
> "Nor may Tomaiolo's testimony be classed as purely voluntary. Even if he did not have actual knowledge of the times during which Louis Soviero was in prison, the prosecutor had the means of gaining such information. Yet he pressed the reluctant Tomaiolo to answer. . . ."

B. *The reference to petitioner's criminal record was not an isolated one but was reiterated on several occasions.* Had there been but the one instance of mentioning petitioner's former incarceration, an argument could be made that it was sufficiently isolated and immediately stricken so as to be inconsequential. See *United States* v. *Stromberg,* 268 F. 2d 256, 269 (C.A. 2). But such is not this case. Petitioner's court-appointed counsel brought out the matter again in a question[2] which was stricken before an answer could be given. Tr. 27. But almost immediately the trial judge himself mentioned Occoquon, asking coun-

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[2] The attorney apparently asked the question to bring out the fact that the witness rather than the petitioner had a criminal record. Tr. 27. See his closing argument. Tr. 56. But the question was artlessly phrased and served to emphasize petitioner's record.

sel "why do you mention Occoquon?" Tr. 27. The damage was further compounded a short while later when the complaining witness, immediately after a direction by the judge to pursue the preceding question, volunteered the information again that petitioner had "done a year at [fol. 93] Occoquon." Tr. 30. This time no objection was made and the answer remained unstricken.

Finally, the Court itself, in its charge to the jury, reiterated the fact that petitioner and the complaining witness had "met at Occoquon," Tr. 66, and that this fact should be considered only in connection with the credibility of the complaining witness.

Here, then, was an accumulation of the original remark, which had been induced by the prosecution. A serious question is thus raised as to whether the mere striking of the original answer of the defense counsel's subsequent question was enough to cure the error, repeated as it was on at least four occasions. Cf. *United States* v. *Giallo*, 206 F. 2d 207, 209-210 (C.A. 2), affirmed, 346 U.S. 929.

To the extent that petitioner's trial counsel contributed to the error, it must be remembered that he was appointed by the court below and was not of petitioner's own choosing. In that setting, it may be unfair to saddle petitioner with the consequences of such an error by appointed counsel. But more importantly, the whole chain of references originated in the original question by the prosecution and was repeated by the court itself and by the complaining witness without accompanying disavowals to the jury. Tr. 30, 66. Such a chain of events, all emphasizing petitioner's prior record, could only serve to prejudice the jury and deprive petitioner of a fair trial. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2).

C. *The error was not cured by adequate instructions to the jury or other action of the trial judge.* When the complaining witness first mentioned the petitioner's prior incarceration, the trial judge did no more than strike the answer on the prosecutor's request. Tr. 12. The judge [fol. 94] also did no more than strike defense counsel's question referring to that previous answer, again on the prosecutor's suggestion. Tr. 27. But when the witness subsequently volunteered the fact that "Me and Benny

done a year at Occoquon," Tr. 30, the prosecutor, the defense counsel and the Court remained silent. And, to cap matters, the judge himself repeated the reference to Occoquon in the presence of the jury both during the trial, Tr. 27, and in his instructions to the jury, Tr. 66. On neither of those occasions did the judge take adequate precautions as to the possible prejudicial effect on the jury.

Simply striking the one answer and the one question was not enough. It has been held that merely telling the jury, at the suggestion of the prosecutor, to "disregard the last statement" is inadequate in the absence of a sufficient instruction. *United States* v. *Tomaiolo,* 249 F. 2d 683, 695 (C.A. 2). By the same token, the judicial statement here that the answer or the question "may be stricken," Tr. 12, 27, is inadequate in the absence of sufficient instructions. But not even that inadequate protection was afforded as to the witness' later reiteration of the prejudicial fact. Tr. 30.

The instruction to the jury on this matter was totally inadequate. Tr. 66. The judge merely told the jury that the fact that the petitioner and the witness had met at Occoquon did not permit an inference of guilt of the petitioner, that it was to be "considered only in as far as it affects his (the complaining witness') credibility as a witness." Tr. 66. Nowhere was there any command to the jury, or even a suggestion, to disregard the Occoquon references completely. There was nothing like the judicial direction in *United States* v. *Curzio,* 179 F. 2d 380, 381 (C.A. 3), "to brush it from your minds, because it has nothing to do with this case," a direction there repeated [fol. 95] in the instructions that "there is no evidence in this case that Mr. Curzio has a police record or that he has ever been convicted of any crime before, so wipe that out of your minds completely."

Nor did the judge here do what the trial judge did in *United States* v. *Stromberg,* 268 F. 2d 256, 269 (C.A. 2), and direct the jury "to pay no attention to that remark in any way . . . to disregard it completely." See also *Marsh* v. *United States,* 82 F. 2d 703, 704 (C.A. 3). In *United States* v. *Apuzzo,* 245 F. 2d 416, 420, note 4 (C.A. 2), over a strong dissent, the trial judge who himself

had induced the improper testimony was held to have overcome the error only by promptly telling the jury that the prejudicial facts "ought not to have been brought out . . . you are to disregard anything you heard . . . blame me for anything that occurred in that respect" and by later instructing the jury that "any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant."

Here there was nothing but an unexplained striking of some of the prejudicial remarks, a striking that was devoid of any simultaneous warning to the jury to disregard the remarks. And some of the remarks were not stricken. By the end of the trial, before the instructions, the jury had firmly implanted in its mind that the petitioner had a prior criminal record. Nothing the court had done served to dismiss that fact from the jury's mind. In these circumstances, a short statement of two sentences in the instructions to disregard the prejudicial fact in determining guilt but to consider that fact in assessing the credibility of the complaining witness falls abysmally short of the judicial action essential to preserve the fairness of the trial.

[fol. 96] D. *This error was plain, substantial and reversible, even in the absence of objection by petitioner's counsel.* The references to petitioner's past criminal record were so flagrant and so prejudicial as to call for correction by this Court and a reversal of the conviction pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure. As in *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2), this Court should not "fail to notice a plain error so far reaching because no objection was taken." And compare *Surratt* v. *United States*, 269 F. 2d 240, 241 (App. D.C.). The ruling in *United States* v. *James*, 208 F. 2d 124, 125 (C.A. 2), is particularly pertinent in this connection:

> "The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character of the appellant, who did not by testifying make that an

issue, to permit his erroneous admission of it to pass as harmless error."

Moreover, the only witness to identify petitioner as a participant in the crime was the complaining witness. Since it was made plain that this witness also had a criminal record, his testimony may have been substantially discredited in the eyes of the jury. And conviction of petitioner conceivably could have rested in large part upon the impression of petitioner gained by the jury during the trial as to his past criminal proclivities. By the time the instructions were given, that prejudicial factor may have become so dominant that far more than the off-hand direction to disregard the criminal record in assessing guilt may have been necessary. The inadmissible testimony may thus have been not only prejudicial but pivotal in a close case such as this. See *United States* v. *Tramaglino,* 197 F. 2d 928, 932 (C.A. 2).

It is submitted, therefore, that a substantial question [fol. 97] warranting full review is inescapably presented by the record in this case.

II. *Was the trial judge properly assigned to conduct the trial in this case?*

A second substantial question presented by this record grows out of the fact that the presiding judge, Judge Joseph R. Jackson, was a retired member of the Court of Customs and Patent Appeals acting on assignment for the year 1960 to the United States District Court for the District of Columbia. Serious constitutional questions as to the validity of that assignment and as to the power of Judge Jackson to preside at this trial are thereby raised. More particularly, the following considerations are involved:

A. *The legislative nature of the Court of Customs and Patent Appeals.* Judge Jackson retired from the Court of Customs and Patent Appeals as of April 1, 1952. See 193 F. 2d XV. As of that time there can be no question but that the said court was very plainly "a legislative and not a constitutional court." *Ex parte Bakelite Corp.,* 279 U.S. 438, 459. It was a court created solely to determine

"matters arising between the government and others in the executive administration and application of the customs laws," and its functions included "nothing which inherently or necessarily requires judicial determination." *Ibid.*, 458. See *Katz,* Federal Legislative Courts, 43 Harv. L. Rev. 894.[3]

True, Congress in 1958 sought to declare that court as one "established under Article III of the Constitution of the United States." 72 Stat. 848, 28 U.S.C.A. 211. What the effect is of such a declaration need not here be explored. The important fact, and one only emphasized by the 1958 amendment, is that as of 1952 and earlier, [fol. 98] the Court of Customs and Patent Appeals was plainly a legislative and not a constitutional court. The 1958 amendment can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later.

The conclusion seems to follow that Judge Jackson was never nominated or confirmed for any position other than that of a judge on a legislative court.

B. *The constitutional nature of the United States District Court for the District of Columbia.* On the other hand, the District Court below is very plainly one of the "constitutional courts of the United States, ordained and established under Art. 3 of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office." *O'Donoghue* v. *United States,* 289 U.S. 516, 551. In addition, certain administrative or non-judicial functions may constitutionally be given the court below, making it something of a hybrid court from the constitutional viewpoint. Such non-judicial functions grow out of the power of Congress to legislate for the District of Columbia. See 1 Moore, Federal Practice, Sec. 0.4(4), page 72 (2d ed.). But the basic fact remains that it is essentially and primarily a constitutional court, the judges of whom are nominated, confirmed and vested with authority for

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[3] See discussion of this matter by this Court in *Eastern States Petroleum Corp.* v. *Rogers,* No. 15109, decided May 12, 1960.

purposes of exercising the judicial power of the United States under Article III of the Constitution.

C. *The statutory basis of Judge Jackson's assignment.* There can be no doubt, moreover, as to the purported *statutory* authority for the assignment of a retired member of the Court of Customs and Patent Appeals to the District Court below. Under 72 Stat. 849, 28 U.S.C.A. 294, as amended in 1958, and even before, a retired judge [fol. 99] of the former court can be designated and assigned to the court below. For purposes of that statute, a retired judge of the Court of Customs and Patent Appeals is a "retired judge of the United States."

D. *The constitutional question as to the validity of the assignment.* The ultimate question thus is whether a designation and assignment to the court below of a judge who retired in 1952 from the Court of Customs and Patent Appeals can *constitutionally* be made so as to authorize such a judge to exercise the judicial powers of the court below. Or, can 72 Stat. 849, 28 U.S.C.A. 294, constitutionally be utilized to effect such an assignment?

The answer to that question is both unclear and significant in terms of petitioner's right to be tried by a tribunal properly constituted. See *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, as to the standing of a litigant to raise such an issue. It is a right which is truly significant and essential to the preservation of basic procedural guarantees. As the Supreme Court emphasized in *Toth* v. *Quarles*, 350 U.S. 11, 15-16, Article III courts are established "to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."

In other words, can Congress authorize the trial of an individual accused of crime—whether that crime be outlawed by the District Code or the United States Code—by

[fol. 100] a court consisting of any judge other than one who originally was vested with authority to sit on an Article III count? Could Congress, for example, authorize a retired Tax Court judge to be assigned to the court below?

The Supreme Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 460, implied that there may be "constitutional obstacles to assigning judges of constitutional courts to legislative courts." Equally true, and perhaps more so, there may be constitutional objections to assigning a retired legislative court judge to a constitutional court, particularly in order to exercise a judicial function. Such a retired judge may not have the constitutional status and freedom which only an Article III court judge can have.

Precisely those doubts have been adverted to in 1 Moore, Federal Practice, Sec. 0.4(1), page 60, note 34 (2d ed.), where it is noted that "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." And see Note, 69 Harv. L. Rev. 760, casting doubt on the propriety of the assignment of a territorial court judge from Hawaii to the Court of Appeals for the Ninth Circuit in *Irish* v. *United States*, 225 F. 2d 3.

This problem, as indicated, is not easy of solution. See the diversity of opinion as to a related matter in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582. But enough has been indicated to show that the problem is an important one inescapably presented by this case. It deserves full review and consideration by this Court, after the parties have had opportunity to explore and brief the manifold facets.

[fol. 101] CONCLUSION

For the foregoing reasons, petitioner should be granted leave to prosecute his appeal *in forma pauperis*. Petitioner's good faith has been more than adequately established "by the presentation of any issue that is not plainly

frivolous" so as to survive dismissal in the case of a non-indigent litigant. *Ellis* v. *United States,* 356 U.S. 674.

Respectfully submitted,

/s/ Eugene Gressman
EUGENE GRESSMAN
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court.

August 31, 1960

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 102] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 1481

[Title omitted]

OPPOSITION TO MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—
Filed September 19, 1960

Comes now respondent by its attorney, the United States Attorney, and makes this opposition to the petition for leave to prosecute an appeal in forma pauperis.

The memorandum filed by appointed counsel asserts two grounds in support of the petition. One relates to the references that the complaining witness had known appellant at Occoquon. The first reference, made in response to a prosecution question, was stricken on the prosecution's motion. The second reference was contained in a question asked by defense counsel. It, too, was stricken on the Government's motion. But defense counsel resisted, stating "Your Honor, I believe I have a right to ask where he knew this man." In response to this argument, the court made the third reference; and the complaining witness then volunteered the fourth. (Mem. 6.) Accordingly, defense counsel was himself in great measure responsible for the references. In these circumstances, they cannot constitute the plain error necessary for review in the absence of objection. Rule 52(b), Federal Rules of Criminal Procedure. Not only did defense counsel make no objection to the references, he also did not object to the court's instruction that they could be considered by the jury only insofar as they bore upon the credibility of the complaining witness. What-
[fol. 103] ever difference there may be between this instruction and one that the references could not be considered with respect to appellant is too insubstantial to overcome the absence of objection. Rule 30, Federal Rules of Criminal Procedure.

Second, the memorandum questions the constitutionality of Judge Jackson's assignment to the District Court. The premise of the argument is that Judge Jackson retired from the Court of Customs and Patent Appeals when it was a legislative court and that the 1958 legislation (28 U.S.C. § 211) making it an Article III court "can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later" (Mem. 16). The difficulty with this premise is that upon retirement Judge Jackson had a status as a retired judge which the 1958 legislation could and did affect. Appointed counsel does not suggest that the judges sitting on the Court of Customs and Patent Appeals at the time of the 1958 legislation did not thereby become judges of an Article III court. Yet none of them was nominated or confirmed as a judge of an Article III court. Nor was any of them renominated or reconfirmed after the legislation was enacted. Just as the 1958 legislation made them active judges of an Article III court, it constituted Judge Jackson a retired judge of an Article III court. The premise of appointed counsel's argument thus falls and, with it, the conclusion that a substantial question is presented. Other questions raised in the petition but not in the memorandum are, as the memorandum notes, without merit (Mem. 7-8).

Wherefore, it is respectfully submitted the petition for leave to prosecute an appeal in forma pauperis be denied.

/s/ Oliver Gasch (CWB)
OLIVER GASCH,
United States Attorney.

/s/ Carl W. Belcher
CARL W. BELCHER,
Assistant United States Attorney.

/s/ Stephen N. Shulman (CWB)
STEPHEN N. SHULMAN
Assistant United States Attorney.

[fol. 104] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 104] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

REPLY MEMORANDUM FOR PETITIONER—
Filed September 19, 1960

On behalf of the petitioner, this memorandum is filed in reply to the respondent's opposition to the petition for leave to prosecute an appeal *in forma pauperis.*

Respondent's opposition consists solely of a denial of the merits of the two questions presented on behalf of petitioner. But such a denial is not relevant in the present posture of this case. The Supreme Court has warned against converting the "good faith" test of 28 U.S.C. § 1915 "into a requirement of a preliminary showing of any particular degree of merit." *Ellis* v. *United States,* 356 U.S. 674, 675. It is enough that the issues raised are plainly not frivolous so that the appeal would not be dismissed in the case of a nonindigent litigant.

Certainly the issues here raised do not fall into the plainly frivolous category. Whether the circumstances attending the revelation of petitioner's criminal record constitute plain error that can be corrected by this Court in the absence of objection is obviously a non-frivolous issue and respondent's simple denial of its merits cannot transform it into a frivolous one. So, too, the question as to the constitutionality of Judge Jackson's assignment is inherently a novel and substantial one, whatever re-
[fol. 105] spondent may think of its merits. To put the matter simply, had this appeal been by a nonindigent defendant respondent could not have utilized its opposition herein to secure the dismissal of the appeal under Fed. Rules Crim. Proc. 39(a).

Even assuming some discussion of the merits is appropriate, however, respondent overlooks two vital facts in its opposition:

(1) The prosecutor knew or should have known, by virtue of the U.S. Commissioner's report, that the complaining witness had first met petitioner in prison. The major responsibility for setting into operation the chain of statements to that effect must fall on the prosecution. And the trial judge's failure to correct the impression thus gained by the jury and to give proper instructions may well be an error of the most egregious sort.

(2) This case does not involve the assignment of any judge of the Court of Customs and Patent Appeals sitting at the time of the 1958 legislation. Whether there are different considerations as to such judges does not have to be reached in this case. The only conceivable question here relates to a judge who retired long before the 1958 legislation. As to him the effect of that legislation on judges sitting in 1958 has no direct bearing. The constitutional question as to him is substantial and unanswered.

Respectfully submitted,

/s/ Eugene Gressman
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court.

September 19, 1960.

[fol. 106] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 107] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Wilbur K. Miller, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—September 23, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and the opposition, it is

ORDERED by the court that the petition for leave to prosecute an appeal in forma pauperis is denied.

Per Curiam.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 109] • • • •

[fol. 110] SUPREME COURT OF THE UNITED STATES

No. 480 Misc., October Term, 1960

BENNY LURK, PETITIONER

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 23, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 669.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 35-A]

SUPREME COURT OF THE UNITED STATES

No. 669, October Term, 1960

BENNY LURK, PETITIONER

vs.

UNITED STATES

JUDGMENT—May 29, 1961

ON WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the District of Columbia Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby reversed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the District of Columbia Circuit for proceedings in conformity with the opinion of this Court.

May 29, 1961

Dissenting opinion by Mr. Justice Frankfurter with whom Mr. Justice Harlan and Mr. Justice Stewart join.

[fol. 36]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 16407

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER SETTING CASE FOR HEARING—June 7, 1961

It is ORDERED by the court, sua sponte, that this case is set for hearing before the court en banc at 10:00 a.m. June 20, 1961, on the basis of the briefs and appendix filed in the Supreme Court in *Lurk* v. *United States*, No. 669, October Term, 1960, which briefs and appendix are incorporated in this case by reference.

It is FURTHER ORDERED by the court that counsel for appellant is allowed until June 12, 1961, to file a supplemental brief and that counsel for appellee is allowed until June 19, 1961, to file a supplemental brief. These briefs may be in mimeographed form and shall be served personally.

Per Curiam.

Dated: June 7, 1961

[fol. 37]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,407

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the United States District Court for the District of Columbia

OPINION—Decided June 22, 1961

Mr. Eugene Gressman (appointed by this court) for appellant.

Mr. Charles T. Duncan, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, and *Donald S. Smith,* Assistant United States Attorney, were on the brief, for appellee.

Messrs. Archibald Cox, Solicitor General, *Herbert J. Miller, Jr.,* Assistant Attorney General, *Oscar H. Davis,* Assistant to the Solicitor General, *Miss Beatrice Rosenberg, Philip R. Monahan, Mrs. Patricia R. Harris,* and *Mr. Richard W. Schmude,* Attorneys, Department of Justice, were on the brief for the United States, filed in the Supreme Court in *Lurk* v. *United States,* No. 669, Oct. Term, 1960, which was also considered by the court in this case.

[fol. 38] *Mr. Roger Robb* for the Chief Judge and Associate Judges of the United States Court of Customs and Patent Appeals, as *amici curiae.*

Mrs. Francis Shea, with whom *Mr. Richard T. Conway* was on the brief filed in the Supreme Court in *Lurk* v. *United States,* No. 669, Oct. Term, 1960, for Marvin Jones, Chief Judge of the United States Court of Claims, and Samuel E. Whitaker, et al., Judges of the United

States Court of Claims, as *amici curiae,* which was also considered by the court in this case.

Mr. Bennett Boskey was on the brief for Mark Coppedge, Jr., as *amicus curiae,* filed in the Supreme Court in *Lurk* v. *United States,* No. 669, Oct. Term, 1960, which was also considered by the court in this case.

Before WILBUR K. MILLER, Chief Judge, and EDGERTON, PRETTYMAN, BAZELON, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, sitting *in banc.*

PER CURIAM: This case is here on appeal from the United States District Court for the District of Columbia, following remand from the Supreme Court of the United States. *Lurk* v. *United States,* —— U.S. —— (1961). We heard argument *in banc* on the merits of the two contentions advanced by appellant's able court-appointed counsel, namely, (1) that certain evidence was erroneously admitted at appellant's trial for robbery in the District Court, a trial which resulted in his conviction; and (2) that the assignment of a retired judge of the Court of Customs and Patent Appeals to preside at the trial was in violation of appellant's constitutional rights.[1]

[fol. 39] The first of these contentions is not tenable. The evidence complained of, which might perhaps have indicated to the jury that appellant had once been a prison inmate, was largely brought out by appellant's own trial counsel.[2] The first reference to the matter came during examination of the complaining witness by Government counsel.[3] The latter, claiming suprise, asked that the answer be stricken. This was done. Appellant's counsel,

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[1] The assignment was made by the Chief Justice of the United States pursuant to 28 U.S.C. § 294(d). Retired "judges of the United States," including retired judges of the Court of Customs and Patent Appeals, are available for assignment. Appellant acknowledges that the statute purports to authorize assignments of the sort challenged here.

[2] Not of counsel on this appeal.

[3] The witness was asked where he had previously seen appellant, and replied "In Occoquan." A District of Columbia workhouse or jail is located in Occoquan, Virginia.

after amplifying the subject through his own examination, received a limiting instruction and expressed himself as satisfied. We find no error.

As to the remaining question, several constitutional issues were raised, centering on appellant's contention that the trial judge, having been appointed to the Court of Customs and Patent Appeals, said to be a court constituted under Article I of the Constitution, could not constittuionally sit on an "Article III" court, i.e., the United States District Court for the District of Columbia. Appellant relies on such cases as *Ex parte Bakelite Corporation,* 279 U. S. 438 (1929), and *Williams* v. *United States,* 289 U.S. 553 (1933). The Government and the *amici* (except Coppedge) argue that these cases are not controlling, and that the Court of Customs and Patent Appeals (as well as the Court of Claims) is a court created by Congress under Article III of the Constitution.

Deeming it our duty to dispose of the case with as complete an avoidance as may be of constitutional questions, see *Harmon* v. *Brucker,* 355 U.S. 579 at 581 (1958),[4] we affirm the conviction and determine that the trial judge was qualified to sit, on the following ground: that the [fol. 40] assignment must in any event be sustained under the plenary power of Congress over the District of Columbia and its courts, pursuant to Article I, Sec. 8, Cl. 17, of the Constitution.

The judge in this case was appointed to the Court of Customs and Patent Appeals in 1937. At that time there was in force a statute specifically providing:

> "The judges of the United States Court of Customs and Patent Appeals, or any of them, whenever the business of that court will permit, may, if in the judgment of the Chief Justice of the United States the public interest requires, be designated and assigned by him for service from time to time, and until he shall otherwise direct, in the Supreme Court of the District of Columbia or the United States Court of Appeals for the District of Columbia, when

[4] We are mindful, too, of our duty to expedite the hearing and disposition of appeals in criminal cases.

requested by the Chief Justice of either of said courts." 28 U.S.C. § 22 (1934 ed.).

Thus, the post to which the trial judge was appointed by the President and confirmed by the Senate was one which clearly included the possibility and prospect of judicial service on the Supreme Court of the District of Columbia, now the United States District Court for the District of Columbia. The Congress spoke of "service" on that court—by which it must have meant the exercise of every type of jurisdiction possessed by the court.[5] The statute is now not limited to the District of Columbia but includes assignments to judicial service throughout the country.[6] Be that as it may, we think that at all [fol. 41] relevant times Congress has specifically made available the services of the judges of the Court of Customs and Patent Appeals to meet the needs of the United States District Court for the District of Columbia. We think there can be no doubt of the power of Congress to do so, in view of the broad sweep of its legislative authority over the Federal District. See *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 619 (1838); *O'Donoghue* v. *United States*, 289 U.S. 516, 545 (1933); *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428, 443 (1923).

We need not examine the other contentions of the parties.

Affirmed.

Circuit Judge Fahy took no part in the hearing or decision of this case.

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[5] The quoted statute goes on to provide:

"During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)."

[6] See 28 U.S.C. §§ 291-296 (1958 ed.).

[fol. 42]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 16,407

District Court Criminal No. 180-60

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: Wilbur K. Miller, Chief Judge, and Edgerton, Prettyman, Bazelon, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting *in banc*.

JUDGMENT—June 22, 1961

This cause came on to be heard before the court in banc on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: June 22, 1961

Each member of the court reserves the right to file a statement of his views at a later date.

Circuit Judge Fahy took no part in the hearing or decision of this case.

[fol. 43]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,407

BENNY LURK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Statement of Circuit Judge Prettyman, Concurring in Opinion Filed June 22, 1961

CONCURRING OPINION—Filed July 17, 1961

PRETTYMAN, *Circuit Judge,* concurring: A bit of history is pertinent. In 1921, when this court had three judges and our District Court had six judges, a bill [1] to provide additional judges for certain judicial districts (not including this one) was introduced in the House of Representatives. During floor debate on the bill Representative Volstead proposed an amendment which would have allowed the Chief Justice of the United States to designate judges of the Court of Customs Appeals (now the Court of Customs and Patent Appeals) to serve on any United States District Court or on the Supreme Court of the [fol. 44] District of Columbia and the Court of Appeals for the District of Columbia.[2] The legislative record indicates that the Senate rewrote the House bill, eliminating the amendment here pertinent.[3] In conference the amendment was reinserted in a limited form, *i.e.*, limited to designations to the courts of the District of Columbia.[4] No further discussion appears to have occurred on the

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[1] H. R. 9103, 67th Cong., 1st Sess.

[2] 62 CONG. REC. 207 (1921).

[3] See S. REP. No. 497, 67th Cong., 2d Sess. (1922).

[4] See H. R. REP. No. 1152, 67th Cong., 2d Sess. (1922).

floor of either House. The section as thus written was enacted.[5] The section was reenacted in substantially the same form when Title 28 was "revised, codified, and enacted into law" in 1948.[6] In the present Title 28 the limited section has been superseded by a broad power to designate judges of the Court of Customs and Patent Appeals to any federal Court of Appeals or District Court.[7]

Subsequent to the Act of 1922 judges of the Court of Customs Appeals were regularly designated to sit on this court. Our minutes show that on October 12, 1922, Judge James F. Smith first sat here. Judge George E. Martin (who was later to be appointed Chief Justice of this court) first sat here on October 23, 1922, and on November 2nd of that year Judge Orion M. Barber first sat. Other judges of the Court of Customs Appeals were from time to time designated, and by 1924 that court's full complement of judges had been designated to serve on this court. These judges were listed as Associate Justices of this court in Volumes 52 through 58 of our official Reports, with the notation that they had been [fol. 45] designated here by the Chief Justice pursuant to the Act of September 14, 1922. Similar listings of those judges as judges of this court appear in the Federal Reporter from 284 Fed. to 32 F. 2d. Leafing through the reports of our opinions one readily finds many cases in which judges of the Court of Customs Appeals sat on this court. By an Act of June 19, 1930,[8] the membership of this court was increased to five judges. In Volume 59 of our Reports, which is for April, 1929, to December, 1930, and thenceforward, the listings of the Customs Court judges as judges of this court were discontinued.

Similar designations were made to our District Court, then the Supreme Court of the District of Columbia. Judge Smith was assigned by the Chief Justice on March

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[5] Act of Sept. 14, 1922, 42 STAT. 837, 839.

[6] 62 STAT. 869.

[7] S. REP. No. 2309, 85th Cong., 2d Sess. 4 (1958). Act of August 25, 1958, 72 STAT. 848.

[8] 48 STAT. 785.

14, 1925, to serve there "during the absence and inability to serve" of Justice Siddons; and on January 9, 1928, Judge William J. Graham and Judge Charles S. Hatfield were so assigned. These judges sat in many trials for many years.

Although at no point in the debate on the bill above discussed was it indicated that any member of the House was aware of the distinction between constitutional and legislative courts, the question whether judges appointed to the Customs Court were qualified to sit on District Courts was thoroughly discussed. The suggestion was that judges appointed to the Customs Court were chosen to perform certain narrow tasks and might not be qualified to exercise the broad powers of a federal District or Circuit Judge. The matter was debated, with eloquent espousals of the abilities of these judges. Portions of the debate are printed in an Appendix hereto, but it is sufficient here to note that, after both sides of this argument were fully presented, the House voted to accept the amendment.

[fol. 46] So, as a matter of history, Congress specifically provided that judges of the Court of Customs Appeals might sit on the courts of the District of Columbia, over which Congress had complete legislative power as well as its power to establish inferior courts in the Judicial Branch of the Government. Such judges did in fact many years ago and in many cases sit as judges, on both the trial court of general jurisdiction (now the District Court) and the appellate court (this court) in this jurisdiction. So the designation of Judge Jackson to sit on our District Court, and his sitting there, is nothing new. The practice has been occurring off and on for almost forty years. Pursuant to historical precedent he might have been designated to sit on this court; as, indeed, he was. See, for example, *Hamilton* v. *United States,* 102 U.S. App. D.C. 298, 252 F.2d 862, *cert. denied.* 357 U.S. 939 (1958); *Payne* v. *District of Columbia,* 102 U.S. App. D.C. 345, 253 F.2d 867 (1958); *Rothe* v. *Ford Motor Company,* 102 U.S. App. D.C. 331, 253 F.2d 353 (1958).

[fol. 47] APPENDIX

The following are excepts from debate in the House of Representatives on December 10, 1921, 62 CONG. REC. 190-191, 207-209:

"Mr. VOLSTEAD. • • •

"• • • We purpose to offer as an amendment to this bill a provision, which has been approved by the Judiciary Committee, authorizing the judges of the Court of Customs Appeals to function in the district courts as judges of those courts. Those judges have had but very little to do for a number of years. There are five of them living here in this city drawing a salary, I believe, of $8,000 per year. They are capable men, just as capable as any of the ordinary district-court judges. The reputation they bear is very good. They can easily do work in West Virginia to help clean up the court dockets there and in some of the adjoining States. It is our purpose to make those judges function the same as the other judges that we have on the pay roll. With those judges located here, there would be no difficulty whatever in supplying an additional judge, if necessary, down in West Virginia. It is true that as soon as the new tariff bill passes, for some months, perhaps for a year or two, they may have considerable work in the Court of Customs Appeals, but as soon as the construction of the new tariff law is fixed they will have considerable leisure. At least that has been our experience. During the last few years those judges have been without much of any work, and during the last Congress one of these came to me and asked me to introduce a bill to give them an opportunity to be assigned to district and circuit work. We passed that bill in the House, but for some reason or other it failed in the Senate.

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"Mr. HUSTED. Does the gentleman feel sure that the judges who sit on the bench of customs appeal are as well qualified to act as the district judges?

[fol. 48] "Mr. VOLSTEAD. There is no question in my mind about that.

"Mr. HUSTED. They handle but two classes of cases, reappraisement, and classification cases under the tariff law.

"Mr. VOLSTEAD. I know, but they are high-class lawyers; they were men who could have been put on the district bench or circuit bench when appointed.

"Mr. HUSTED. But they have not been practicing for years. They have been serving on this customs court of appeals.

• • • •

"Mr. VOLSTED. They are as good lawyers as the average district judge trying such questions. There is no doubt of their qualification. The Chief Justice, and I do not think it is improper for me to say to you that he called my attention to the fact that these men were high-grade men and ought to be put to work, and that they were capable of serving in the district courts or in the supreme court or court of appeals in this district. And we hope this House will accept that amendment and allow those men to do this work, and if they are given the work there is absolutely no excuse, even with the congestion that exists to-day, for providing an additional judge for West Virginia.

• • • •

"Mr. HUSTED. Mr. Chairman, I think this amendment should not prevail. The gentlemen who are now on the Customs Court of Appeals may be very able lawyers. Personally, I do not know as to that, but I do know this, that they need not be necessarily very great lawyers to serve well in that court. They have but two classes of cases to pass upon. One class is that of cases of reappraisement of the valuation of merchandise imported into the United States. The other is the classification of that merchandise. They deal almost exclusively with questions of fact and very little with questions of law. They may have [fol. 49] been able men and able lawyers when they went on the bench, but they have been out of touch with

the practice of the law for many years, and I am very sure that in my own State and in my own district we would not want one of these men assigned to come there and try these vastly important cases—admiralty cases and patent law cases—when they have not been in touch with the practice of the law for years.

"Why, by this amendment we are practically creating a number of district judges. We should not create them in that way. These men were not appointed because they were well qualified to be district judges. They were appointed because they were well qualified to pass upon questions arising under the tariff law. I do not think we would aid the administration of justice by enacting an amendment of this kind. I do not think we would facilitate the transaction of our important business. I think it would be a bad precedent, an unwise thing to do. I think it would lower the standard of judicial service and accomplishment, and I feel that the amendment should be defeated.

* * * *

"Mr. RAKER. Mr. Chairman and gentlemen of the committee, I did not rise to discuss the amendment I offered to the Volstead amendment and shall not discuss it. It is in the same language as the other sections, and is necessary. It is wholly immaterial to me what the House does with it. But what I do rise to say is this: The Chief Justice of the United States Court of Customs Appeals, Judge DeVries, was a former and able Member of this House, where he had a high standing. He has a high standing as a member of the bar of California. None better. Another member, Judge Smith, was Governor General of the Philippines, and for years stood at the head of the bar of San Francisco as a lawyer. The other two men on the bench of that court, one of them from Vermont, Judge Barber, and the other from Ohio, Judge Martin, and each of them stood at the head of the profession in the State from which he came. The statement that only two questions are involved before this court is a mistaken statement. Read the

[fol. 50] reports of the decisions of that court, nine volumes now published and one partly published, and you will find that all the questions of evidence in civil and equity cases are involved in those decisions. All these men are the peers of any of the judges of the district courts of the United States as men, in ability, and as civil and equity lawyers, all men of wide experience, able lawyers, and able and worthy judges, and they would be a credit to the district bench wherever they might be sent to preside, and they can give the very best service. I am for this amendment and hope it will be adopted.

"Mr. CURRY. Mr. Chairman, I have the honor of the personal acquaintance and friendship of three of the members of the Court of Customs Appeals. There are no abler lawyers in the United States of America than those three men. They would grace the Supreme Bench of the United States. I had the honor to succeed one of these gentlemen as a Member of this House. There is no question as to their ability, there is no question that they could perform the duties of United States district judges as well as anyone who might be selected. The only question to be considered by the committee is as to whether the duties of the Court of Customs Appeals will permit of their devoting their time to other work after the tariff bill shall have been enacted. I can not sit quiet and hear their ability attacked without stating that from my personal knowledge there are no better lawyers in the United States than these three men, and none better qualified to perform the duties of district judges should this amendment be adopted and any of them should be assigned to hear and decide any case that may come before such court.

"Mr. WINGO. [Opposed the amendment.]"

The amendment was agreed to.

[fols. 51-52] • • • •

[fol. 53] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 54]

SUPREME COURT OF THE UNITED STATES

• • • •

Order Granting Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari— October 9, 1961

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 481.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 9, 1961

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 617315 518

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 481

BENNY LURK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner by appointment of the Court of Appeals

December, 1961